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Kenneth Lasson

*University of Baltimore School of Law*, [klasson@ubalt.edu](mailto:klasson@ubalt.edu)

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# IN DEFENSE OF GROUP-LIBEL LAWS, OR WHY THE FIRST AMENDMENT SHOULD NOT PROTECT NAZIS

KENNETH LASSON\*

## I. INTRODUCTION

*I disapprove of what you say, Voltaire is often quoted as saying, but I will defend to the death your right to say it.*

We civil libertarians traditionally invoke those words to support the argument that all speech deserves protection. *Abhorrent ideas will fester if suppressed*, we suggest somewhat piously, *and wither and die if aired*. It is a noble, fetching, and romantic theory, but one to which the horrors of recent history have put the lie. While we pledge allegiance to the nobility of the first amendment and worship its sacrosanctity—as we should—we seem yet to have learned the perils of absolute trust and blind faith. And so we resolutely refuse to follow the sensible lead of other countries in prohibiting racial defamation and group libel.

*Item:* In the fall of 1971 an American actor named Billy Frick, portraying Hitler in a film made for German television, left the production set in full costume and went into a public bar in Munich. He bore an eerie resemblance to *der Fuhrer*. It is not clear whether the appreciative applause of the assembled patrons was for the verisimilitude of the charade, or simply that their sensitivities were dulled by *gemutlichkeit*, but there was precious little of the fear, disgust, or revulsion that one might have expected. In fact, Frick/Hitler was warmly received.<sup>1</sup> Were

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\* Professor of Law, University of Baltimore School of Law; A.B., M.A., The Johns Hopkins University; J.D., University of Maryland School of Law; member, American Civil Liberties Union. The writer is indebted to several participants in his Civil Liberties Seminar—notably Allan S. Steinhorn and Elizabeth A. Hambrick-Stowe—who contributed substantially to the dialogue which yielded the conclusion of this article, and to Dwight King, Esq., for his research assistance. Different versions of this article originally appeared in the *Duquesne Law Review* and the *Columbia Human Rights Law Review*.

1. STERN, Aug. 18, 1971.

it not for his obviously innocent motives—he was acting, after all, and he said he was intellectually curious to see the reaction he would cause—Frick could very likely have been tried and convicted under a German law prohibiting the glorification of Nazism.<sup>2</sup>

*Item:* From 1979 to 1984 the number of anti-semitic vandalisms in the United States increased 700 percent.<sup>3</sup> There is no gauging the growth in popularity in hate-mongers such as the Reverend Louis Farakhan, whose notoriety reached a zenith when he called Hitler a “great man” and Judaism a “gutter religion” during the last presidential campaign. In many European countries Farakhan could have been arrested and thrown into jail.<sup>4</sup>

*Item:* In 1985 Ernst Zundel, a German-born commercial artist, was convicted in Canada for publishing a pamphlet declaring that accounts of the Holocaust are a hoax.<sup>5</sup> But in this country neo-Nazis are free to march through predominantly Jewish sections of Skokie, Illinois, and the activities of the so-called Liberty Lobby and the Institute for Historical Review, which seek to deny that the extermination of six million Jews was a matter of deliberate Nazi policy, continue unabated.<sup>6</sup>

The message is this: racial hatred may be so much a part of human nature that it is unrealistic to expect it to dissolve, either of its own limited accord or from the rational development of human civilization and ethics, but it is wrong to regard as self-evident the wisdom of the jurisprudential philosophy which would protect the expression of bigotry on the basis of blind principle—that is, as a matter of free speech. Put another way, it is Constitutional folly at one and the same time to prohibit obscenity and protect Nazi punks. Even consistent civil libertar-

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2. Several years later, in fact, Frick was arrested when he appeared as Hitler outside a fairgrounds in Frankfurt. STERN, Oct. 15, 1973.

3. The actual numbers were as follows: 129 in 1979, 377 in 1980, 974 in 1981, 829 in 1982, 670 in 1983, and 715 in 1984. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1984 AUDIT OF ANTI-SEMITIC INCIDENTS 1 (Jan. 1985).

4. See *infra* notes 152-157 and accompanying text, for examples of what would happen elsewhere.

5. Baltimore Sun, Mar. 1, 1985, at 8, col. 1.

6. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1983 AUDIT OF ANTI-SEMITIC INCIDENTS 3 (Jan. 1984). See also *Village of Skokie v. Nat'l Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

ians should not find it difficult to fight against pornography statutes and Nazis.

For the most part, the laws which prohibit racial defamation or group libel were enacted subsequent to World War II, and then primarily in Western Europe, Scandinavia, and Canada. In the United States they exist in only a handful of states and have been but rarely tested. Why this is the case—but should not be—will be the subject of this article.

### A. Racism: "The Evil to be Restricted"

Throughout American (and world) history, racism has fostered the occasion for strife, violence, and misunderstanding.<sup>7</sup> In its institutionalized form of slavery, racism underlay the major political crisis in United States history, the Civil War. As anti-semitism it nurtured the Holocaust—the single most terrifying episode of the twentieth century if not all human experience. It has been used to justify the genocide of Armenians in Turkey and Eritrians in Ethiopia. Racism has been called America's "intractable,"<sup>8</sup> most "baffling"<sup>9</sup> problem. Is it so much the way of all flesh that combatting it amounts to little more than a waste of social energy?

History demonstrates that racism is assailable.<sup>10</sup> Racially-rooted problems can be dealt with through the law, as was cogently illustrated by Arthur Larson in a 1969 law review article.<sup>11</sup> The two extreme views—that the law is useless to change

7. See F. USTINOV, *MY RUSSIA* 163 (1983); Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights*, 90 YALE L.J. 741, 754-55 (1981) [hereinafter cited as Bixby]; KERNER COMM'N NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 91 (1968); Brown, *Racism and the Rights of Nations*, 21 NOTRE DAME LAW. 1, 1 (1945).

8. *Beauharnais v. Illinois*, 343 U.S. 262 (1952).

9. Bixby, *supra* note 7 ("the colored problem is the most complicated and baffling of all our social problems"). Shapiro writes, "[T]he racial question is the one issue in American life that has at various times proved unamenable to the normal workings of the political process . . . to become a conflict of principle. Conflicts of principle are, of course, the one sort of conflict that a liberal democracy, whose life is compromise, cannot tolerate, for it is possible to compromise interests but not principles." See *infra* note 25, at 137.

10. See M. McDUGAL, H. LASSWELL & L.C. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 197 n. 103 (1980) [hereinafter cited as *HUMAN RIGHTS*].

11. Larson, *The New Law Of Race Relations*, 1969 WIS. L. REV. 470 (1969). Professor Larson was, of course, speaking of white-black relations specifically. The principles underlying his arguments are equally applicable to other forms of racism. See also *Beauharnais*, 343 U.S. at 261-62.

attitudes, or that any gain achieved is negligible—are simply contradicted by hard evidence.<sup>12</sup> Law in its legislative or judicial forms may be ineffective where overt racism is widespread and deeply rooted,<sup>13</sup> but unbridled, blatant prejudice has become somewhat anachronistic,<sup>14</sup> at least in the United States.

In the international community as well, "man's most dangerous myth"<sup>15</sup> has been increasingly discredited. In 1959, following a rash of racist incidents in Europe and South America,<sup>16</sup> the United Nations adopted a Declaration on the Elimination of All Forms of Racial Discrimination.<sup>17</sup> "[A]ny doctrine of racial differentiation or superiority," read the statement, "is scientifically false, morally condemnable, socially unjust and dangerous, and . . . there is no justification for racial discrimination either in theory or in practice."<sup>18</sup> Not only is discrimination said to deny human rights and offend human dignity, it constitutes "an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples."<sup>19</sup> In times of hardship or stress, outbreaks of racial hatred and violence become an expression of frustrated anger, feeding upon itself in a vicious cycle.<sup>20</sup> The victimized group is identified by the attacker according to its race, and is conveniently made the scapegoat in what can be called "an economy of thought."<sup>21</sup> Little if any intellect is necessary to hurl racial epithets, paint a

12. Larson, *supra*, note 11, at 511-12.

13. *Id.* at 514. His specific example was the failure of prohibition.

14. *Id.* See also *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Town Seeks Reason For Synagogue Burnings*, Baltimore Sun, Oct. 3, 1983, at A1, col. 5.

15. HUMAN RIGHTS, *supra* note 10, at 569 n. 176. The source of the quotation is G. MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (5th ed. 1974): "The popular categorization of race . . . when indulging in 'man's most dangerous myth' [is] built upon vague, shifting, and erratic references."

16. HUMAN RIGHTS, *supra* note 10, at 585-86.

17. Adopted by G.A. Res. 1904, 18 U.N. GAOR Supp. (No. 15) at 35, U.N. Doc. A/5603 (1963).

18. *Id.* at 36. (Preamble).

19. *Id.* at art. 1. The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature and ratification of G.A. RES. 2106A. 20 U.N. GAOR (1965).

20. See, e.g., Allport, *The Nature of Prejudice* (1954), in D. BELL, *RACE, RACISM AND AMERICAN LAW* 85 (1973) [hereinafter cited as Allport]; Rowan and Mazie, *Can The Klan Come Back?*, READER'S DIG. 197 (Sept. 1983) [hereinafter cited as *Can The Klan Come Back?*]; *Hard Times Trigger Racial, Religious Hate*, 11 HUM. RTS. 7 (Winter 1983).

21. See note 20, *supra*.

swastika, burn a cross, or blame a minority group for specific problems.<sup>22</sup> A "free and robust exchange of ideas"<sup>23</sup> is nonexistent; there is a total absence of debate by which each individual can make up his own mind, on the basis of all the evidence, on every political-moral issue.<sup>24</sup> Racial defamation short-circuits the democratic principle of self-government.<sup>25</sup> By threatening this basic presupposition, it becomes a substantive evil not only to those persons directly targeted, but to all society.

### B. Groups & Individuals: Interest & Injury

An intimate nexus exists between individuals and the groups or associations to which they belong. Procedurally, associations may assert the rights of their members.<sup>26</sup> Most courts, however, have been unable, or unwilling, to depart from the traditional theory that redress for libelous characterization is available only where an individual has been injured, or to recognize that the defamation of a group directly injures its members.

America remains a great melting pot, with perhaps greater diversity of ethnic representation than any other place in the

22. Seymour Lipset suggests in *The Sources of the Radical Right*, in *THE RADICAL RIGHT*, 259 (D. Bell, ed. 1963) [hereinafter cited as Lipset] that after World War II, anti-communist crusades became the vehicle for hostilities formerly directed against Jews; anti-semitism fell into disrepute, but McCarthyism was riding high. *Id.* at 289. Lipset's theory was correct; once McCarthyism declined, racism and its anti-semitic variant again became the easy outlet, "white [Gentile] supremacy, cloaked in patriotism and religion." *See Can The Klan Come Back?*, *supra* note 20, at 203.

23. *Miller v. California*, 413 U.S. 15, 34-35 (1973).

24. *See Wellington, On Freedom of Expression*, 88 YALE L.J. 1105, 1135 (1979).

25. The danger to "ordered liberty" is not merely violent disruption of public order. As Professor Riesman noted, discussing Nazi Germany, the leaders utilized a more insidious approach, but one no less dangerous to democratic pluralism than overt violence, since they "aim[ed] at the political and economic annihilation of groups . . . and use[d] violence only incidentally." Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COL. L.R. 727, 753 (1942) [hereinafter cited as Reisman, *Group Libel*]. Both Justice Douglas, dissenting in *Beauharnais*, 343 U.S. at 284-87, and Professor Shapiro, discussing the future of the first amendment, seem not to have considered this subtle danger, equating it simply with overtly violent conspiracy or action: "something close to a new civil war." M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 46-72 (1966) [hereinafter cited as SHAPIRO]. Similarly, the F.C.C. in 1972 refused to ban the continued broadcasting of a white supremacist candidate for the U.S. Senate, saying that it did not rise "above the level of public inconvenience, annoyance, or unrest," and that no clear and present danger was posed. *See infra* text accompanying note 151.

26. *NAACP v. Alabama*, 357 U.S. 449, 458-59 (1958).

world. It has almost literally torn itself apart to effect racial integration. When destructive attacks on a group are permitted, individuals within the ranks inescapably suffer.<sup>27</sup> Where Jews or blacks are defamed as a group, the speaker's target is each Jew or each black. The same is true with any other racial/ethnic denomination. When a neo-Nazi bemoans the fact that Hitler "didn't finish the job [of exterminating Jews]," he is not likely to turn to a Jewish person and say, "Of course, I didn't mean to include you."<sup>28</sup>

It has been suggested that one type of paranoia is the projection by one group upon another of its own low self-esteem.<sup>29</sup> As libel law has traditionally focused on the individual, psychiatrists have been concerned primarily with the pathology of individual paranoia. However, in light of the conflicts, misunderstandings, acts of violence, and "deaths on a massive scale" which group-paranoid processes have caused, "psychiatrists may come to identify them as the most serious pathogenic factors in our era."<sup>30</sup> In short, injury to the self, between individuals, and among groups is inflicted by the paranoia from which racism springs, and of which racial defamation is one expression.

Private victims of defamation are more entitled to redress for their injuries than public figures, because they have not chosen to lead a public life or speak out on public issues so as to make themselves a target for attack.<sup>31</sup> In addition, a private person's capacity for self-help is more limited.<sup>32</sup> Persons targeted by

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27. See Nimmer, *The Right to Speak from Time to Time: First Amendment Theory applied to Libel and Misapplied to Privacy*, 56 CALIF. L.R. 935, 949-50 (1968) [hereinafter cited as Nimmer]; Riesman, *Group Libel*, *supra* note 25, at 731; and Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950) [hereinafter cited as Tanenhaus].

28. Professor Riesman appears to be more preoccupied with the form of the statement than its substance, when he ponders whether "virulent attacks are actually libelous or slanderous." The statement he then refers to, "If I had my way, I would hang all the Jews in this country," seems clearly to be racially defamatory. It should not be necessary for racial defamation to take some particular form, such as an accusatory slur or epithet. Reisman, *Group Libel*, *supra* note 25, at 751, quoting *People v. Nunfo*, New York City Magis. Ct. (7th Dist., Borough of Manhattan, Sept. 20, 1939), stenographer's minutes 9-10, cited in *ABUSES OF CIVIL RIGHTS AS VIOLATIONS OF THE NEW YORK PENAL LAW* 9 (n.d.).

29. Pinderhughes, *Understanding Black Power: Processes and Proposals*, 125 AM. J. PSYCHIATRY 1552-57 (1969), in D. BELL, *RACE, RACISM AND AMERICAN LAW* 89-91 (1973).

30. *Id.*

31. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

32. *Id.* See also Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308, 328 (1979).

reason of their racial or ethnic identity are in the same position: they have not chosen their ancestry, which the speaker treats less as an objective fact than as a subjective course of disparagement.<sup>33</sup> Individuals within the group are all the more vulnerable to the defamatory speech.<sup>34</sup>

Older cases suggested that the very breadth of the libel (casting aspersion wholesale upon a large population of diverse individuals) would undercut the charges.<sup>35</sup> But this approach presupposes a more rational response by the speaker's audience than experience with racial defamation warrants.<sup>36</sup> It also fails to

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33. See Downs, *Racism in America and How To Combat It*, in D. BELL, *RACE, RACISM AND AMERICAN LAW* 87-88 (1973). Allport describes the process: "An imaginative person can twist the concept of race in almost any way he wishes, and cause it to configure and 'explain' his prejudices." Allport, *supra* note 20, at 85 (1973). See also HUMAN RIGHTS, *supra* note 10, at 569 ("a race is any group of people whom they choose to describe as a race") (quoting A. MONTAGU, *STATEMENT ON RACE* (3d ed. 1972)). A. NEIER, *DEFENDING MY ENEMY* 17 (1979), indicates that in the bitter in-fighting among the various neo-Nazi groups, Frank Collin was accused by rivals of having Jewish blood.

34. Neier also indicates that in Nazi Germany, those persons of Jewish background who had converted to Christianity nevertheless were classified as Jews. The label was applied for the benefit and purposes of the attackers, rather than to reflect any scientific or objective fact. Neier, *supra* note 33, at 26. See also HUMAN RIGHTS, *supra* note 10, at 580. Of course, the concept of race itself is at best amorphous, since "[r]aces change, die, merge with other races, become modified by racial intermarriage . . . . Race is manifestly a transitory fact." Brown, *Racialism and the Rights of Nations*, 21 NOTRE DAME LAW. 1, 11 (1945).

Recently, a Louisiana woman challenged her racial classification under a state statute which labelled her legally "colored" on the basis of 1/32 Negro ancestry. Smart-Grosvenor, *Observed With "Racial Purity,"* Ms. 28 (June 1983). The obviously fallacious nature of such a racial classification system resulted in the repeal of the law. Editor's Note, Ms. 12 (Sept. 1983). In some families where negroid and caucasian genetic characteristics are present, there may be children who look "black" and others "white." The apparently "white" children then may make an affirmative self-identification of themselves as black (but probably not vice versa). Conversation with D. Bruce Hanson, Center for Community Change, Wash., D.C. (August 27, 1983).

35. Riesman, *Group Libel*, *supra* note 25, at 770. In *People v. Edmondson*, 168 Misc. 142, 4 N.Y.S.2d 257 (Ct. Gen. Sess., N.Y. Co. 1938), the court opined that the law need not be stretched to protect against group libel. Abuse of freedom of speech would be effectively restrained by speakers' good sense or, that failing, by awareness that defamatory attacks are self-defeating. *Id.* at 143, 4 N.Y.S.2d at 259. One wonders at what distance from reality this judge lived. See also Tanenhaus, *supra* note 27, at 266-73 (discussing old English and American criminal libel cases involving Jews, civil war veterans, and Knights of Columbus); Note, *Defamation of Group*, 21 NOTRE DAME LAW. 21, 22 (1945).

36. See Allport, *supra* note 20, at 85. See generally Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COL. L. REV. 1085 (1942) (discussing use of libel and slander by fascists) [hereinafter cited as Riesman, *Fair Game*]. An illustration is provided *infra* at note 149 and accompanying text. Judicial tolerance of racial defama-



take seriously the destructive nature of racism upon civilized society.<sup>37</sup> Whether particular racial characterizations could be "proven true" is a straw issue which often plays into the hands of the defamer.<sup>38</sup>

When the John Birch Society accuses someone of being a "communist," his denial alone is not a complete cure for the injury to his reputation. A black individual may be in a worse position when subjected to the slander "niggers are rapists" or even to the milder proposition "blacks are genetically inferior." Against the group smear, which inevitably has some partial factual basis<sup>39</sup> (some blacks are convicted rapists, some have low I.Q.s), the statement's deleterious effect is not so easily remedied. The "intractible problem" of racism is made more so.

The traditional arguments against the constitutionality of group-libel laws--that there is no injury because no individual is directly defamed and that society is somehow stronger for permitting self-expressions through the intentional infliction of injurious racial attacks<sup>40</sup>--are unpersuasive in the light of history, social science, and common sense.

tion, demonstrated in, e.g., *People v. Edmondson*, 168 Misc. 142, 154, 4 N.Y.S.2d 257, 268-69 ("It is wiser to bear with this sort of scandal-mongering . . . . We must suffer the demagogue and the charlatan, in order to make certain that we do not limit or restrain the honest commentator on public affairs") reflects a persistent allegiance to the marketplace of ideas. The hard case of racism, however, especially in its extreme form (for example, Hitler's genocidal practices) is an invariable part of marketplace discussions. See e.g., Schauer, *Speech and Obscenity*, 67 Geo. L.J. 889 at 915-16 (1979) [hereinafter cited as Schauer, *Obscenity*], (slavery was not a wise policy, Nazism was not correct), Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1132 (1979). Since the deleterious effects of group-directed racism are abundantly evident, the judicial conclusions that racial defamation of groups inflicts no harm which reasoned reflection will not cure seems illogical at best. See Nimmer, *supra* note 27, at 955.

37. Lipset, *supra* note 22, at 298 also indicates the long-term effect that even an episodic wave of hate-mongering can have on the social fabric. His illustration: the restrictive immigration laws passed in the early 20th century.

38. Riesman, *Fair Game*, *supra* note 36, at 1089-1101 (describing European experience).

39. See Tanenhaus, *supra* note 27, at 293. Tanenhaus concludes that the problem of "proof" is a major stumbling block to the enforcement of group libel law. But the judiciary is clearly capable of drawing the necessarily fine lines involved in speech claims, so the first amendment is not merely "an unlimited license to talk." See *Konigsberg v. State Bar of Calif.*, 366 U.S. 36 (1961). Courts should be able to address relativity and partial truth in group libel, as they do for individuals.

40. See e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 286-87 (Douglas, J., dissenting); *Thomas v. Collin*, 323 U.S. 516, 545-46 (1945) (Jackson, J., concurring); W.O. DOUGLAS, *AN ALMANAC OF LIBERTY* 363 (1954); 1 N. DORSEN, P. BENDER, B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 570 (4th ed., 1976); Garvey, *Children and the*

One commentator has been naive enough to suggest that in the absence of confrontations with group libel, the ability of citizens to respond intelligently and effectively to racist rhetoric would shrivel up from disuse: "If we never hear the questions, we will soon forget the answers."<sup>41</sup> The citizens of Germany were given ample opportunity to confront Nazi racism; that their ability to respond intelligently *did* shrivel up resulted in one of the greatest tragedies of all time.<sup>42</sup>

The issue is really whether the law is ready to recognize the nature and extent of the harmful effect<sup>43</sup> and whether the courts are ready to accept group libel as an analytically sound basis for liability.<sup>44</sup>

*First Amendment*, 57 TEX. L. REV. 321, 363 (1979); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1131-34 (1979); Note, *Offensive Speech and the First Amendment*, 53 B.U.L. REV. 834, 854 (1973) (discussing from the perspective of radical black speech); Note, *Free Speech and the Hostile Audience*, 26 N.Y.U. L. REV. 489, 498 (1951).

41. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 98 (1981). Professor Haiman articulates no fewer than four other reasons to rebut the argument that group libel is not protected by the first amendment because it is socially worthless. First, he says that a racially defamatory statement (e.g., "Jews control the media"), is not empirically verifiable or falsifiable. But even if one cannot prove or disprove that Poles are dumb, Jews crafty, blacks lazy, or Italians greasy—such characterizations are fundamentally counter-productive in a free society. If a jury decides that the speaker's motivation was malicious, he is no more protected by the first amendment than is one who defames an individual. Second, who is to decide what is "socially worthless"? (The jury in every case). Third, a group member's emotional distress is the price he must pay for freedom of speech. (Why? The targets of "fighting words" and obscenity have remedies). Fourth, the Supreme Court has been specific in requiring that fighting words have a *direct* tendency to cause violence, that personal libel must be *proven*, and that advocacy must incite *imminent* lawlessness to be restrictable. (The Court uses whatever language is necessary to reach its desired result).

42. See *supra* note 1 and accompanying text. See also correspondence from Charles S. Sims, 89 YALE L.J. 1450, 1451 (1979).

43. See Burkey, *Racial Discrimination and Public Policy in the United States* (1971) in D. BELL, *RACE, RACISM AND AMERICAN LAW* 100-101 (1973); HUMAN RIGHTS, *supra* note 10, at 581-83; Tannenhaus, *supra* note 27, at 278.

44. Riesman, *Group Libel*, *supra* note 25, at 772. Professor Riesman recognized the speculative nature of damages in group libel, suggesting that the appropriate relief might be an action in equity for an injunction. *Id.* at 771-72. See also Tanenhaus, *supra* note 27, at 290-91 (discussing procedural aspects). In *Beauharnais v. Illinois*, 343 U.S. 250, Justice Frankfurter indicated that whether or not racial defamation laws would solve the underlying problems, states should be permitted to handle them through "trial-and-error inherent in . . . efforts to deal with obstinate social issues." *Id.* at 262.

## II. GROUP LIBEL ACTIONS

A. *In the States*

Group-libel statutes are currently in the criminal codes of five states.<sup>45</sup> In four of them (Connecticut, Massachusetts, Montana and Nevada), the gravamen of the offense is holding up to ridicule, hatred, or contempt of any group or class of people because of their race, color, or religion.<sup>46</sup> The Illinois statute, changed from that which was upheld in *Beauharnais*, specifically requires that the offensive speech be provocative of a breach of the peace.<sup>47</sup>

In Illinois, Massachusetts, and Montana there must be a demonstrable intent to defame.<sup>48</sup> Such a probative requirement is important: absent proof of specific intent, a statute might punish unsuspecting distributors of racially defamatory materials

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45. See CONN. GEN. STAT. § 53-37 (West 1960); ILL. ANN. STAT. ch. 38 § 27-1 (Smith-Hurd 1977); MASS. ANN. LAWS ch. 272, § 98c (Michie/Law. Co-op 1980); MONT. CODE ANN. § 45-8-212 (1984); NEV. REV. STAT. § 2100-510 (1979). Two states have statutes which are worded in such a way that a group libel action could be brought. IND. CODE § 34-4-15-1 [2-1043] (1984 supp.) and N.J. REV. STAT. § 2A 43-1 (1984-1985 supp.). Although neither statute specifically states that the member of a defamed group may bring suit, the New Jersey statute refers only to the plaintiff, while the Indiana statute refers to the "aggrieved party."

There is some confusion as to the status of several Oregon statutes involving harassment by abusive words (ORS 166.065(1)(b)) and racial intimidation (ORS 166.155). See *State v. Harrington*, \_\_\_\_ Or. App. \_\_\_\_ (1984) and *State v. Beebe*, \_\_\_\_ Or. App. \_\_\_\_ (1984).

46. The Montana statute does not specify race, color, or religion, but uses the phrase "group, class, or association." The Nevada statute includes those defamed to be "person or persons, or community of persons, or association of persons." Like the Montana statute, it does not specify race, color, or religion.

47. ILL. ANN. STAT. ch. 38 § 27-1 (Smith-Hurd 1977). The legislative revision committee in Illinois felt that, insofar as the law of criminal libel was designed to compensate for or to mitigate the injury to the victim's reputation, it has failed. In addition, the criminal law should generally not be used to remedy private wrongs. A tort action for libel or slander is more appropriate and more effective. Consequently, the theoretical justification for criminal defamation is grounded entirely on the prevention of breaches of the peace. *Id.* Committee Comments—1961, revised in 1970 by Charles H. Bowman. The Illinois statute thus retains one of the principles of *Beauharnais*, reiterated by Justice Brennan in *Garrison*: speech likely to lead to public disorders, such as group villification, is not protected. 379 U.S. 64, 70 (1964).

48. The Massachusetts statute requires an "intent to maliciously promote hatred of any group," while the Montana law punishes one who publishes defamatory matter "with knowledge of its defamatory character." Illinois uses the language "with intent to defame another."

and thus be unconstitutionally overbroad. Indeed, that is what weakens the Connecticut and Nevada statutes.<sup>49</sup>

Many legislatures appear to be frightened off by some vague spectre of unconstitutionality. In Maryland, for example, a criminal group-libel statute was recently considered but never enacted after that state's Attorney General offered his opinion that the Supreme Court's rulings in *New York Times v. Sullivan*,<sup>50</sup> *Garrison v. Louisiana*,<sup>51</sup> and *Ashton v. Kentucky*<sup>52</sup> had effectively precluded enforcement of criminal libel laws.<sup>53</sup> Similarly, the Judiciary Committee of the United States House of Representatives held hearings on proposed group-libel legislation in 1943, but no federal laws on the subject have ever been enacted.<sup>54</sup>

### B. *Beauharnais: Still Good Law*

Group libel is a category of speech which has seldom been tested at the Supreme Court level.<sup>55</sup> The last time a group-libel statute came before the Court was in 1952 in *Beauharnais v. Illinois*.<sup>56</sup> This case involved the prosecution of a white supremacist under a state law prohibiting any publication which exposed citizens to the traditional injuries of defamation (contempt, derision, and obloquy) by casting aspersions on their race, color, creed, or religion.<sup>57</sup> Against challenges that the stat-

49. Of course, it could well be argued that specific intent is not necessary—that is, that publishers and distributors should be aware of the content of what they publish and distribute, and should be forced to make judgments about its libelous nature.

50. 376 U.S. 254 (1964).

51. 379 U.S. 64 (1964).

52. 384 U.S. 195 (1966).

53. Opinion No. 82-014 (March, 1982), to be published at 67 Op. Att'y Gen. (Md. 1982). The proposed Maryland statute was neither targetless nor vague; for the reasons espoused by this article, it should have been regarded as entirely constitutional. See also *State v. Harrington*, \_\_\_\_ Or. App. \_\_\_\_ (1984) and *State v. Beebe*, \_\_\_\_ Or. App. \_\_\_\_ (1984), *supra* note 45.

54. F.S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 90 (1981).

55. The *Skokie* case was not a true test since the legal basis for the town's position was context—not content—based restriction of the Nazis' speech. Moreover, the fact that the Supreme Court denied certiorari in *Skokie* does not constitute a decision on the merits, and has no formal precedential value.

56. 343 U.S. 250.

57. The statute read:

It shall be unlawful . . . to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any [publication] which . . . portrays depravity, criminality, unchastity, or lack of virtue of a class of

ute violated the free speech and due process guarantees of the first and fourteenth amendments, and was overly vague, the Supreme Court upheld the statute's constitutionality by a five-to-four split.

For analytic purposes, the dissents in *Beauharnais* remain as significant as Justice Frankfurter's opinion for the majority. Justice Reed assumed the power of the state to pass group-libel laws, and dissented on the grounds that the statute in question was too vague.<sup>58</sup> Justice Jackson agreed that enactment of group libel laws would be within the power of the states (though not the federal government).<sup>59</sup> He dissented because the trial judge had offered the defendant no opportunity to prove a defense (fair comment, truth, privilege),<sup>60</sup> and because there had been no showing of a clear-and-present danger.<sup>61</sup> Justice Douglas suggested that defamatory conduct directed at a race or group in this country could be made an indictable offense, since, "[l]ike picketing, it would be free speech plus"<sup>62</sup> although he would require either a conspiracy or clear-and-present danger to support an indictment.<sup>63</sup> Only Justice Black considered the defendant's activity—petitioning for redress of grievances, discussing public issues, and expressing views favoring segregation—to be fully protected by the first amendment.<sup>64</sup>

Eight of the nine justices, therefore, indicated that group-libel laws could constitutionally be enacted. Although the law means whatever the Court sitting at any given time says it means, there are sound reasons to believe that a properly drafted statute prohibiting defamation of a group on the basis of race, color, or ethnicity would pass constitutional muster.<sup>65</sup> First,

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citizens, of any race, color, creed, or religion which . . . exposes the citizens . . . to contempt, derision, [or] obloquy or which is productive of breach of the peace or riots . . . .

*Id.* at 251. (Reviewing ILLINOIS CRIMINAL CODE § 224a, ILL. REV. STAT. ch. 38, § 471 (1949)).

58. *Id.* at 277-84.

59. *Id.* at 287-95.

60. *Id.* at 295-302.

61. *Id.* at 302-05.

62. *Id.* at 284 ("Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy").

63. *Id.* at 284-85.

64. *Id.* at 267-75.

65. Joseph Tanenhaus devotes a major portion of his article, *Group Libel*, *supra*,

*Beauharnais* has never been overruled.<sup>66</sup> To the contrary, it continues to be cited by the Court with favor. Second, the *Chaplinsky*<sup>67</sup> conceptual framework on which *Beauharnais* was grounded continues to be the starting point for first amendment analysis. Third, it can well be argued that racial defamation is a form of verbal utterance that is either constitutionally non-speech, akin to hard-core pornography, or, like child pornography, so near the bottom of the hierarchy of protection as to justify state proscription and/or civil liability.

Over the years, *Beauharnais* has been cited in support of a variety of propositions including: the right of a group to make assertions on behalf of its members,<sup>68</sup> the importance of narrow construction in a statute which might otherwise be impermissibly vague or overbroad,<sup>69</sup> the equal stringency of the Bill of

note 27, to the form and substance a constitutional group libel statute should take. He examines critically various state and municipal laws, together with any judicial reaction (though failure to utilize the laws in most cases resulted in an absence of interpretation). Several conclusions emerge: (1) there must be well-defined or accustomed usage, in order to save a statute from being struck down as overly vague; (2) the proscribed content must be clearly defined, so that protected speech would not be swept within the ambit of the statute; and (3) the proscribed content must correspond to the justification by which it is outside the first amendment protection. Tanenhaus concludes that in the United States, the closer a group defamation statute comes to the traditional law of defamation, the greater its chances of being upheld. *Id.* at 297. *Beauharnais* was upheld on precisely those grounds. Justice Frankfurter surveyed the law of libel in an extensive footnote, including the minor variations in different jurisdictions by statute, at common law, and under the Restatement of Torts, 343 U.S. at 255-57 n.5. He then concludes that criminal libel "has been defined, limited, and constitutionally recognized time out of mind." 343 U.S. at 258. Justice Frankfurter also noted that "the rubric 'race, color, creed, or religion' . . . has attained [a fixed meaning]." 343 U.S. at 263 n.18. See also *Collin v. Smith*, 447 F. Supp. 676, 698 (1978). See generally F. SCHAUER, *THE LAW OF OBSCENITY* 154-66 (1976), Ch. 8. "The Requirement of a Strictly Drawn Statute" (discussing overbreadth and vagueness); SHAPIRO, *supra* note 25, at 140-43 (discussing least restrictive means, narrowly drawn statutes, vagueness, reasonableness).

66. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the dissent by Justice Douglas expressly urged that *Beauharnais* "be overruled as a misfit in our constitutional system." *Id.* at 82.

67. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky* held constitutional a state statute banning "face to face words plainly likely to cause a breach of the peace by the addressee." *Id.* at 573. The Court held that this class of speech is not constitutionally protected. The areas of speech in *Chaplinsky* to which the first amendment has been applied (offensive speech, libel of public officials and figures) are clearly distinguishable from defamation of a racial group.

68. *Communist Party of the U.S. v. Subversive Activities Control Board*, 367 U.S. 1, 184 (1967) (Douglas, J., dissenting).

69. *Gottschalk v. Alaska*, 575 P.2d 289, 292 (Alaska 1978).

Rights in the scope of its guarantees applied against the states and the federal government,<sup>70</sup> and the validity of social studies as evidence even though they may not be absolutely conclusive or irrefutable.<sup>71</sup>

Each of these propositions is useful in buttressing the argument that prohibition or punishment of racial defamation is constitutional. The greatest importance of *Beauharnais*, however, rests in its holding that libel is not protected by the first amendment's guarantee of free speech. Justice Frankfurter's opinion addressed the issue directly:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words . . . . It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>72</sup>

Neither, Justice Frankfurter went on, were the due process or liberty clauses of the fourteenth amendment violated. Simply put, defamation may be punished.

Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.<sup>73</sup>

*Beauharnais* thus clearly stands for the proposition that libel is "nonspeech." The language of the Court on this point con-

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70. *E.g.*, *First Nat'l. Bank of Boston v. Bellotti*, 435 U.S. 765, 780-81 n.16 (1978); *Gibson v. Florida Investigative Comm.*, 372 U.S. 539, 560 n.2 (1963) (Douglas, J., concurring).

71. *E.g.*, *Barnett v. Rodgers*, 410 F.2d 995, 1002 n. 24 (1969).

72. 343 U.S. 250, 255-57 (1952).

73. *Id.* at 266.

tinues to be quoted with favor.<sup>74</sup> Those who question the vitality of *Beauharnais* appear to be analytically myopic. Apropos is Mark Twain's comment upon reading the news of his own death: "The reports . . . are greatly exaggerated."<sup>75</sup>

Critics of *Beauharnais* have suggested that its holding as to libel and the first amendment was overruled by *New York Times v. Sullivan*.<sup>76</sup> But that interpretation reads *Sullivan*, which was expressly limited to actions brought by public officials against critics of their official conduct,<sup>77</sup> much too broadly. *Sullivan* did say that no category of speech could be given "talismanic immunity" from the first amendment,<sup>78</sup> but the Court was simply holding that a state could not remove speech from judicial scrutiny merely by the label put on it.<sup>79</sup> The Court has, without exception, ruled that obscene speech is not protected,<sup>80</sup> but, under *Sullivan*, it insists on looking behind the label to satisfy itself that the expression at issue is truly constitutional nonspeech.

If only the negative implications of *Sullivan* were available for support the continued vitality of *Beauharnais* as to "libelous utterances" might indeed be weak. But the case for the non-speech nature of private libel is strengthened by the Supreme Court's continuing reliance upon *Beauharnais*. In several landmark obscenity decisions (notably *Roth v. United States*)<sup>81</sup>

74. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Roth v. United States*, 354 U.S. 476, 486-87 (1957); *State of Maine v. John W.*, 418 A.2d 1097 (1980).

75. Cable from Mark Twain in London to the Associated Press (1897), reprinted in J. BARTLETT, *FAMILIAR QUOTATIONS* 625 (15th ed. 1980).

76. See, e.g., *Anti-Defamation League of B'nai B'rith v. F.C.C.*, 403 F.2d 169, 174, n.5 (D.C. Cir. 1968) (Skelley Wright, J., concurring); *United States v. Handler*, 383 F. Supp. 1267 n.22 (D.Md. 1974); Garvey, *supra* note 40 at 362; *Television Violence*, 64 VA. L. REV. 1123, 1200 (1978); Note, *Offensive Speech*, *supra* note 40 at 836-39. For a detailed argument that *Beauharnais* is "obsolete," having become "unhinged" by *Sullivan*, *Cohen*, and *Gooding*, see F.S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 91-92 (1981). See also Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

77. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

78. *Id.* at 269.

79. Finnis, "Reason and Passion"; *The Constitutional Dialectic of Free Speech and Obscenity*, 116 PA. L. REV. 222, 229 (1967) [hereinafter cited as Finnis].

80. Insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business. *New York Times v. Sullivan*, 376 U.S. 254, 269.

81. 354 U.S. 476 (1957) (utterly without redeeming social value). See also *Miller v. California*, 413 U.S. 15 (1973) (taken as a whole, lacks serious literary, artistic, political, or scientific value).



and *New York v. Ferber*<sup>82</sup>) *Beauharnais* is cited to support the proposition that libel is not constitutionally protected. In *Ferber*, the *Sullivan* holding is expressly characterized as an exception to the *Beauharnais* rule.<sup>83</sup> If the Court had wanted merely to validate the idea that certain words are nonspeech, it could have cited *Chaplinsky*. By pointing to *Beauharnais*, centering as it did on a group-libel law enacted to address the public threat posed by racial bigotry,<sup>84</sup> the Supreme Court appears to have gone further. A strong possibility is indicated that the Court would approve a properly drawn and construed statute or a judicial ruling proscribing racial defamation of a group.<sup>85</sup>

Justice Frankfurter summarily dismissed the argument that a clear and present danger must be proven before a speaker can be punished or restrained.<sup>86</sup> Only certain kinds of speech (e.g., political opinion) are fully protected—that is, subject only to the state's fundamental interest in public order. Where speech is less protected, the state's interest may extend to the prevention of some other type of harm. Affronts to decency,<sup>87</sup> damage to reputation,<sup>88</sup> and injury to the psyche,<sup>89</sup> among others, may constitute "substantive evils that Congress has a right to prevent."<sup>90</sup> *Ferber* uses *Beauharnais* to illustrate the unprotected nature of libel,<sup>91</sup> and goes on to suggest a "codifying" approach toward content regulation where, "within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs

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82. 458 U.S. 747.

83. *Id.*

84. *Beauharnais v. Illinois*, 343 U.S. 250, 258-263.

85. The Illinois statute in *Beauharnais* included defamation of religious groups as well as racial or ethnic groups within its prohibition. This article would limit the reach of group libel to racial or ethnic defamation. Without doubt, religious bigotry has also been a source of social strife and individual injury. However, to include religious defamation would open the courts to what could arguably be excessive entanglement with the free exercise of religion—a separate, affirmative guarantee of the first amendment. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-06 (1952). Racial or ethnic defamation, when cast in the form of religious speech, can be regulated on racial/ethnic grounds. Genuine religious disagreement thus remains protected under both the free speech and free exercise clauses.

86. See 343 U.S. 250.

87. See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

88. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

89. See, e.g., *New York v. Ferber*, 458 U.S. 747.

90. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

91. *New York v. Ferber*, 458 U.S. 747, 763.

the expressive interest, if any, at stake."<sup>92</sup> *Ferber* itself, involving speech not necessarily obscene, upheld its prohibition.

Even if *Ferber* did not explicitly classify group-libel as constitutional nonspeech, the content of group-targeted racial defamation may nonetheless be sufficient basis for state regulation. Thus, in the Skokie-type situation, a finding of imminent public violence should not be required to sustain a group-libel law.<sup>93</sup>

Other critics point to the Supreme Court's decisions in *Ashton v. Kentucky*<sup>94</sup> and *Garrison v. Louisiana*<sup>95</sup> as further proof that *Beauharnais*-type statutes would not survive constitutional challenge today. These critics, however, place too broad an interpretation on those holdings. In *Ashton*, the Court ruled that Kentucky's common law offense of criminal libel could not be enforced because it was too indefinite and uncertain.<sup>96</sup> Since no Kentucky case had redefined the crime in understandable terms, and since the common law was inconsistent with constitutional provisions, the defendant's conviction could not stand.<sup>97</sup> Group-libel laws, however, suffer no such indefiniteness. Because they are legislatively enacted, they can be narrowly drawn to remove uncertainty or vagueness. Citing *Cantwell v. Connecticut*,<sup>98</sup> which had overturned the state's common law crime of breach of the peace because of indefiniteness and susceptibility to arbitrary enforcement, the Court said that such a law must be "narrowly drawn to prevent the supposed evil."<sup>99</sup> And in *Beauharnais*, the statute in question was found to be "a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions, a meaning confirmed by the Supreme Court of that State in upholding this conviction."<sup>100</sup> Thus *Ashton* is clearly distinguishable from *Beauharnais*.

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92. *Id.*

93. See also *Young v. American Mini Theaters*, 427 U.S. 50, 70-71 (1976). To analogize the dictum in *Young*: few would march sons and daughters off to war to preserve the citizen's right to utter threatening, abusive, or insulting words, inciting hatred against the racial or ethnic group of our choice.

94. 384 U.S. 195 (1966).

95. 379 U.S. 64 (1964).

96. 384 U.S. 195, 198.

97. *Id.*

98. 310 U.S. 296 (1940).

99. 384 U.S. 195, 201.

100. 343 U.S. 250, 253.

In *Garrison*, the Supreme Court invalidated Louisiana's criminal libel statute, which sought to punish the malicious publication of anything which exposed any person to hatred, contempt, or ridicule.<sup>101</sup> The statute further provided that "where such a publication or expression is true, actual malice must be proved in order to convict the offender."<sup>102</sup> In finding the statute unconstitutional, the Court stated it could find no sound principle which could make one liable for publishing the truth, even if the publication was actuated by express malice.<sup>103</sup> This is one distinction between *Beauharnais* and *Garrison*; the statute in *Beauharnais* did not criminalize publication of the truth, it outlawed speech which is devoid of truth—group defamation. But the primary holding in *Garrison* involves criticism of public officials. The Court reiterates the position taken in *Sullivan*, that criticism of official conduct by public officials is protected unless the speech is false and made with actual malice.<sup>104</sup> *Garrison* extends the *Sullivan* rule to include criminal as well as civil penalties, but it does not apply to the defamation of private citizens as a group. Both *Sullivan* and *Garrison* indicate concern with preserving the right to criticize government. Neither should be read to bar group-libel statutes.

The constitutionality of laws proscribing group defamation by race or ethnic group appears to hinge on the responses of courts to several fundamental questions. First, is the deleterious effect of racism so substantively evil as to justify state action to prevent or counteract it? Second, even if there is such a compelling state interest, does the evil persist where whole *groups*, not individual persons, are defamed? And third, is group-libel properly characterized as speech, somewhere within the hierarchy of first amendment protection, or can it be classified as totally unprotected "nonspeech"?

### C. Racial Defamation As Speech

The courts have not been oblivious to the patently offensive nature of racial defamation, in that they are quick to repudiate

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101. 379 U.S. 64, 65 n.1.

102. *Id.*

103. *Id.* at 73, citing *State v. Burnham*, 9 N.H. 34, 42-43, 31 Am. Dec. 217, 221 (1837).

104. 379 U.S. at 78.

the message of the speakers.<sup>105</sup> But such repudiation is generally an apology for their judgment that free speech is protected by the first amendment. Justice Black interprets the white supremacist literature in *Beauharnais* as essentially the expression of political ideas on social issues.<sup>106</sup> Various commentators have taken the same approach. One, for example, says that Nazi speech (referring specifically to the Skokie situation) is political in nature,<sup>107</sup> and as such warrants the highest degree of first amendment protection. Another, referring to the speakers as "extreme rightwing neo-facists," nevertheless reminds his readers that "political dissent must not be stifled."<sup>108</sup> Other expressions of racial and ethnic bigotry are variously described as ideas, views, doctrines. Though not expressly labelled political speech, they are treated as contributions to the democratic marketplace where, for first amendment purposes, there is said to be "no such thing as a false idea."<sup>109</sup> "Government cannot protect the public against false doctrine," wrote Justice Jackson in *Thomas v. Collins*.<sup>110</sup> "Each must be his own watchman for truth . . . [since] our forefathers did not trust government to separate truth from falsehood for us."<sup>111</sup> A state court once ruled that the speeches of George Lincoln Rockwell, former leader of

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105. *E.g.*, *Anti-Defamation League of B'nai B'rith v. F.C.C.*, 403 F.2d 169; *Rockwell v. Morris*, 12 A.D.2d 272, 211 N.Y.S.2d 25, 175 N.E.2d 162.

106. *Beauharnais v. Illinois*, 343 U.S. 250, 270 (Black, J., dissenting).

107. Schauer, *Speech*, *supra* note 36, at 919. In his later article, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285 [hereinafter cited as Schauer, *Codifying*], Schauer seemed to modify this position, suggesting that Collin's speech was not protected for its own sake—as political speech—but only as a "fortunate beneficiary" of the courts' desire to protect the broad category of political speech. *Id.* at 286-87. Under the broad-category approach to the speech clause, the marginal speech must be protected to ensure that genuine political speech is not abridged. Under a narrow categorization of speech under a first amendment umbrella of values, the implication is that such "beneficiaries" would lose their free ride.

108. SHAPIRO, *supra* note 25, at 136.

109. Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1245 (1976) (quoting Justice Power in *Gertz v. Robert Welch, Inc.*). This is the basis for Justice Douglas' dissent in *Beauharnais v. Illinois*, 343 U.S. at 284-87. *See also* *Anti-Defamation League of B'nai B'rith v. F.C.C.*, 403 F.2d 169, 174 (Skelley-Wright, J., concurring) (speech approaches the area of political and social commentary). The speech was anti-Zionist, but did not attack Jews as a religious group. Under the facts, then Circuit Judge Burger held that the appeals to reason and to prejudice were impossible to separate. *Id.* at 172.

110. 323 U.S. 516 (1945) (Jackson, J., concurring).

111. *Id.* at 545.

the American Nazi Party, could not be abridged because, if they were, "the preacher of any strange doctrine could be stopped."<sup>112</sup> Another offered the noble-sounding opinion that, "we must suffer the demagogue and charlatan, in order to safeguard the honest commentator on public affairs."<sup>113</sup>

Racial defamation is shielded by the first amendment, the argument goes, for the same reasons that other abhorrent speech is protected. First, because an opinion (not necessarily the "truth") is best arrived at in the free exchange of discussion and persuasion,<sup>114</sup> and second, because the risk to democracy from any form of "pre-screening" far outweighs the benefit of not having to deal with unpopular, alarming, obnoxious, or shocking ideas.<sup>115</sup> It is thus political prudence, not political philosophy, which underlies the freedom for this type of speech.<sup>116</sup>

In so categorizing racial defamation as speech, however, the courts are misconstruing its form for its substance. Superficially, racists claim to be merely expressing legitimate thoughts on the relationship of social groups, urban problems, politics, and the economy—often under the cloak of patriotism.<sup>117</sup> Racial defamation frequently looks like political speech.<sup>118</sup> One need scratch barely beneath the surface, though, to recognize that group-libel offers no ideas, opinions, or proposals—nothing of substance except hatred, nothing of merit except the benefits of bigotry. It

112. *Rockwell v. Morris*, 12 A.D.2d 272, 211 N.Y.S.2d 25, 175 N.E.2d 162.

113. *People v. Edmondson*, 168 Misc. 142, 154, 4 N.Y.S.2d 257, 268.

114. See Garvey, *supra* note 40, at 361 (value of student's free speech in the search for truth is training for adult participation). Professor Shapiro more realistically identifies the outcome of the marketplace model as "the tentative conviction that there is no absolute truth," and its corollary, that "adjustment between rival partial truths is better . . . than adherence to one fixed mixture of truth and falsehood." SHAPIRO, *supra* note 25, at 53; Schauer, *Speech*, *supra* note 36, at 915-17 (history supports proposition that population selection among ideas arrives at truth more readily than governmental selection); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1134 (1979) (quest of democracy is formal justice and evolving truth); *Free Speech and the Hostile Audience*, 26 N.Y.U. L. REV. 489, 498 (1951) ("society's interest in the attainment of the truth through the free exchange of violently divergent ideas").

115. E.g., W.O. DOUGLAS, *AN ALMANAC OF LIBERTY* 363 (1954); SHAPIRO, *supra* note 25, at 55; *Television Violence*, *supra* note 76, at 1213; Note, *Offensive Speech*, *supra* note 40, at 835. The adjectives are those of the court in *Rockwell v. Morris*, 12 A.D.2d 272, 281-82, 211 N.Y.S.2d 25, 35.

116. SHAPIRO, *supra* note 25, at 47.

117. *Can The Klan Come Back?*, *supra* note 20, at 203.

118. See *infra* text accompanying note 151 (statement of white racist candidate).

may be more accurately perceived as linguistic abuse (verbal assault on an unwilling target);<sup>119</sup> the kind of fascism "which aims at political and economic annihilation of groups . . . and uses violence only incidentally";<sup>120</sup> a destructive form of twisted self-expression;<sup>121</sup> or, most simply, scapegoating.<sup>122</sup> Just as a physical assault is not protected self-expression, neither should the verbal assault of racial defamation be misconstrued as protected speech.<sup>123</sup> Just as hard-core pornography is not permitted "talismanic immunity" from judicial scrutiny,<sup>124</sup> neither should racism be allowed to "demean the grand conception of the First Amendment."<sup>125</sup>

#### D. Racial Defamation as Nonspeech

At the very least, racial defamation is "covered but outweighed."<sup>126</sup> In Justice Stevens' hierarchy of constitutional protection, it is mired very near the bottom.<sup>127</sup>

119. Riesman uses the term "verbal sadism." *Fair Game*, *supra* note 38, at 1088. See also Nimmer, *supra* note 27, at 949-50.

120. Riesman, *Group Libel*, *supra* note 25, at 753. See also Riesman, *Fair Game*, *supra* note 36, at 1089 (verbal attacks used in early stages of fascism, as an initial building and unifying anti-democratic tool, while the group is small and/or weak).

121. The phrase is Garvey's, *supra* note 40, at 365.

122. See Nimmer, *supra* note 27, at 949 (freedom of speech as safety valve); D. BELL, RACE, RACISM AND AMERICAN LAW 59 (1973); Riesman, *Group Libel*, *supra* note 25, at 731. Arguably the interest is stronger, since racial targets are substantively injured—by the content—whereas the captive audience is harmed only by the use of the context, a lesser infringement. There is some conceptual similarity between the captive audience, and the unwilling victimized group, so that protection of groups libelled racially is as significant as protection of the captive audience.

123. See Haiman, *supra* note 54, at 42 (discussing the position of Zechariah Chafee, Jr., that some expression is "akin to a body blow").

124. *New York Times v. Sullivan*, 376 U.S. 254, 269. Analogously, the claim that allegedly obscene material has first amendment value (serious literary, educational, scientific or artistic worth, or advocates a position, or intends to impart information) is assessed by a reviewing court. The bare claim does not close the matter. F. SCHAUER, *THE LAW OF OBSCENITY* 36-53 (1976). Of course, attempts to camouflage the nature of racial defamation may not even be made. Handbills circulated by the Nazis prior to their planned demonstration in Skokie contained statements blatantly derogatory to Jews; some denied the Holocaust or made otherwise false representations of verifiable historical fact. Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308, 331 (1979). The white racist campaign advertisement was similarly overt. See *infra* text accompanying note 157.

125. *Miller v. California*, 413 U.S. 15, 34 (1973).

126. Schauer, *Codifying*, *supra* note 107, at 305.

127. *New York v. Ferber*, 458 U.S. 747, 781 (1982) (Stevens, J., concurring).

Indeed, it is difficult to see anything about racial defamation that would justify its participation in the marketplace of ideas. Citizens would not be impoverished by the loss of a political-moral issue about which each must "make up his own mind."<sup>128</sup> All the political, economic, social, and psychological issues of American life would remain to be debated. Racial defamation can be proscribed not as a "strange doctrine"<sup>129</sup> or a false idea, but as a form of assault, as conduct. The speech clause protects the marketplace of ideas, not the battleground.

The Supreme Court's treatment of the religion clauses of the first amendment<sup>130</sup> provides an apt analogy. One is absolutely guaranteed the freedom to believe whatever one wishes, but not the right in every case to translate belief into action.<sup>131</sup> The "preacher of strange doctrine"<sup>132</sup> cannot be restrained from preaching, but the practice of doctrine, strange or otherwise, may be regulated.<sup>133</sup> Only in total abstraction could racist ideas be freely offered in the democratic marketplace of speech.<sup>134</sup>

128. Wellington, *On Freedom Of Expression*, 88 YALE L.J. 1105, 1135 (1979).

129. *Rockwell v. Morris*, 12 A.D.2d 272, 281-82, 211 N.Y.S.2d 25, 35.

130. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

131. See *Cantwell v. Connecticut*, 310 U.S. 396 (1940), "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Id.* at 303-04. This dual aspect was reaffirmed expressly in *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (statute requiring Bible reading in public schools struck down) and *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closing laws upheld).

132. *Rockwell v. Morris*, 12 A.D.2d 272, 281-82, 211 N.Y.S.2d 25, 35.

133. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

134. Whether doctrinal and practical racial hatred can be distinguished is arguable. The expression of racism's theory tends to expose the targeted group to bigotry and prejudice. An objective discussion of the South African system of apartheid would be protected by the speech clause, as would the study of the Bible as literature, without violating the establishment clause. See *School Dist. of Abington Twp. v. Schempp*, 374 U.S. at 223-25. Even cast in its most favorable light by the official interpretations, apartheid is a doctrine of "separate but equal." But in the United States, the conclusion is final: forced, imposed separation is inherently unequal. *Brown v. Board of Education*, 347 U.S. 483 (1953). Where the speaker becomes an advocate for apartheid, therefore, the impermissible line is crossed. The speech, arguably, is inherently racially defamatory. See also *Brown, Racism and the Rights of Nations*, 21 NOTRE DAME LAW. 1, 3 (1945) (distinguishing the principle of unqualified racialisms from the implied racism of discriminatory and paternalistic behavior). But see Wellington, *On Freedom of Expression*, 89 YALE L.J. 1105, 1131-33 (1979) (arguing that there is no such thing as a closed issue, including the issue of genocide); and SHAPIRO, *supra* note 25, at 135 ("we can never be sure that any statement is true").

As mentioned earlier, pornography does not "preach sex"; it offers itself as a sexual surrogate, its purpose to stimulate a response.<sup>135</sup> The speech clause of the first amendment does not apply to pictorial display so minimally cognitive and essentially physical. Analogously, racial defamation does not merely "preach hate"; it is one way hatred is practiced by the speaker, who seeks to stimulate his audience to a like response.<sup>136</sup> Race is a trigger; a whole series of emotionally conditioned responses follow.<sup>137</sup> The Nazis in Germany understood perfectly the rhetorical uses of racism.<sup>138</sup> Contemporary hate-groups likewise manipulate the "boogie,"<sup>139</sup> making little pretense toward persuasion but much toward prejudice.<sup>140</sup>

When the state treats racial defamation as constitutional speech or advocacy, it distorts the relationship between government and individuals.<sup>141</sup> The speech clause of the first amendment is intended to protect individuals from direct governmental domination of opinion, or indirect suppression of unpopular minority positions through tyranny of the majority. But individuals who are abused by reason of their race, color, or ethnicity are also entitled to protection.<sup>142</sup> When the government fails to intervene, nonspeech has succeeded in its masquerade.<sup>143</sup> Vic-

135. See *supra* note 124 and accompanying text.

136. See *Rockwell v. Morris*, 12 A.D.2d 272, 275, 211 N.Y.S. 2d 25, 29, where the court acknowledged that "[g]roup hate and fear are stimulated and expressly intended to be stimulated in those ripe for it." Applying the traditional danger test, the New York court found that Rockwell must be given a permit to speak, as any other "preacher of any strange doctrine," unless a showing of irreversible harm could be made to cut him off. *Id.* at 282-83, 211 N.Y.S.2d at 35-36. This is, of course, a classic contextual analysis.

137. HUMAN RIGHTS, *supra* note 10, at 570.

138. See, e.g., Bixby, *supra* note 7, at 753-61; Riesman, *Fair Game*, *supra* note 36, at 1085-90; Riesman, *Group Libel*, *supra* note 25 *passim*; Riesman & Glazer, *The Intellectuals and the Discontented Classes*, THE RADICAL RIGHT 97 (1963) ("In America, Jews and Negroes divide between them the hostilities that spring from inner conflict . . . In Europe, the Jew must do double duty").

139. Allport, *supra* note 20, at 85.

140. See *Rockwell v. Morris*, 12 A.D.2d 272, 287-90, 211 N.Y.S.2d 25, 41-44 (Eager, J., dissenting); Bixby, *supra* note 7, at 758-59.

141. Riesman, *Group Libel*, *supra* note 25, at 779.

142. See SHAPIRO, *supra* note 25, at 136 (identifying, with regard to extreme right-wing neo-fascists, the problem of not stifling political dissent, while "thwarting their goal of creating intergroup hatred and violence"). *Id.* See also POLITICAL AND CIVIL RIGHTS, *supra* note 40, at 570 (here the Court's treatment of obscenity is attributed, in part, to the inherent difficulty of affirmatively proving the widespread social harms flowing from the speech. The conclusion applies equally to defamation of racial groups: widespread effect, "unsusceptible of proof"). *Id.*

143. See Nimmer, *supra* note 27, at 954-55. Too much of the argument against racial



tims can rebut by means of discussion and persuasion,<sup>144</sup> but those are not necessarily the best means to counteract nonspeech.<sup>145</sup>

The proper analysis of racial defamation—as constitutional nonspeech—would permit fully its regulation by the state. When the American Nazis threatened to march through Skokie, Illinois in the late 1970's, the American Civil Liberties Union argued that the boundary line between protected political dissent and unprotected group defamation would be impossible to draw and that to attempt to draw one could ultimately force democracy to give way to totalitarianism.<sup>146</sup> In the name of free speech, the Nazis' defamatory taunts were deemed protected while the community's interests in privacy, reputation, and social order were allowed to suffer.

To suggest that the law cannot distinguish between political comment and racial defamation<sup>147</sup> is akin to equating Michelangelo's nudes with the salacious depictions in a 42nd Street porno shop. But courts undertake a rigorous scrutiny of the facts before offering protection in obscenity and pornography cases.<sup>148</sup> Subtle line-drawing is also required in free-exercise-of-religion claims. The line between racial defamation and political comment should not be so difficult to draw.

### *E. The Test*

Racial defamation occurs whenever the speaker's intention or the perceived effect of the speech is to cast ridicule or contempt upon a racial group. In every case intention and effect are subjective determinations fully within a court's discretion.

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defamation laws is bound up in rigid adherence to principle, and not enough of it addresses the central thesis of experience.

144. There were certain positive aspects which emerged from the Skokie confrontation. Many people, especially the post-war generation, were reawakened to the horrors of Nazism, and the community rallied in ecumenical fashion behind the rights of the holocaust survivors and against the Nazis. But these do not justify the denial of government protection to the persons defamed in the first place. *See also* Neier, *supra* note 33, at 7-8.

145. Nimmer, *supra* note 27, at 954.

146. The *Beauharnais* opinion rejects this scenario, 343 U.S. 250, 263-64.

147. *People v. Edmondson*, 168 Misc. 142, 154, 4 N.Y.S.2d 257, 268.

148. *See generally* Schauer, *Obscenity*, *supra* note 36, at 156-57.

For example, the following situations could give rise to a finding of constitutionally punishable racial defamation:

- A talk-show host is discussing reparations for Japanese-Americans interned in concentration camps in the United States following the attack on Pearl Harbor. A caller expresses disbelief. "Do you know what those people did? I know . . . ." <sup>149</sup>
- Prior to a planned demonstration, Nazis circulate hand-bills containing statements derogatory of Jews and denying that the Holocaust ever took place. <sup>150</sup>
- A politician says, "I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal the civil rights law, which takes jobs from us whites and gives them to the niggers. The main reason why niggers want integration is because they want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too." <sup>151</sup>

In each of those cases a court should have been clearly within its discretion to determine that what underlay such sweeping indictments of Japanese-Americans, Jews, and blacks was not history, but prejudice. In short, a judge or jury should be free to discern, and allow punishment of, bigotry masquerading as history or political science.

Not all statements, of course, are as clear-cut as those noted above. Take the case of William Shockley, a Nobel Laureate in Physics, who claimed that on the basis of certain intelligence tests that he had conducted, he could demonstrate that blacks were genetically inferior. <sup>152</sup> Should such a claim be protected by the first amendment? According to the formula suggested above,

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149. Comments made by a caller to the Fred Fisk Show, 885 FM (Wash., D.C.), Sept. 16, 1983. The issue of the United States internment policy necessarily includes exploration of the rationale put forward at the time: the perceived threat of Japanese-Americans as a potential Fifth Column. Whether the caller's speech constitutes genuine discussion, or mere racially based prejudice and expression of contempt for the Japanese as a group, would be a factual matter, to be determined in view of all the circumstances.

150. See Note, *Group Vilification Reconsidered*, *supra* note 32.

151. F.C.C. News Report, No. 10844 (Aug. 3, 1972), reprinted in D. BELL, *RACE, RACISM AND AMERICAN LAW* 357 (1973).

152. See the discussion in Note, *Group Vilification Reconsidered*, *supra* note 32.

not necessarily. A court could constitutionally decide that Shockley's *personal* conclusion about racial inferiority (as opposed to the data itself) was wrongfully motivated and therefore defamatory. Similarly, where a study of illegitimate single, teenage births indicated a higher percentage of babies born to single, teenage black mothers than to single, teenage whites, it could be defamatory for one to state openly that the study proved that black girls are predisposed to promiscuity simply because they are black.

Analagously, a court would be well within constitutional bounds to hold that the display of swastikas does not contribute significantly to any important political discussion of fascism.<sup>153</sup> Although that movement's generic symbol—the rod and bundle of arrows—bears legitimate political connotations, the swastika was Hitler's personal symbol as well as the insignia for the Nazis' anti-semitic ideology of "aryan" superiority. Its display is essential only to convey the message that genocide is justifiable.<sup>154</sup> Of course, a court would also be constitutionally capable of adopting a more libertarian approach without having to invoke constitutional necessity as its rationale. As the Supreme Court pointed out in *Ferber*, it will monitor not only the broad suppression of speech, but the overprotection of verbal expression as well.<sup>155</sup>

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153. If courts believe that defamation (including symbolic speech) of a racial or ethnic group could be a likely part of politically significant speech, they will remain unwilling to permit its regulation or punishment. This is possibly the critical element in the argument for regulation. Cf. *New York v. Ferber*, 458 U.S. 747, 754 (1982) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

154. A more likely modern question is where anti-Zionism fits into these issues. The conclusion of the D.C. Circuit Court in *Anti-Defamation League of B'nai B'rith v. F.C.C.*, 403 F.2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969), is probably correct. The position of the ADL that anti-Zionism *per se* constituted an appeal to racial or religious prejudice was not accepted by the court. In the facts, no direct expression of anti-Jewish attack was made. The court accepted the FCC's position that it would be impractical (and virtually impossible) to separate the appeals to reason and to prejudice. *Id.* at 172. But a direct anti-semitic appeal to prejudice would be separable. Then circuit court Judge Burger reminded the FCC of its "duty to consider a pattern of libellous conduct," treating it as something distinct from the merely unpopular speech anti-Zionism was found to be. *Id.*

155. *New York v. Ferber*, 458 U.S. 747.

*F. What Would Happen Elsewhere*

The test proposed above is necessary only under a constitutional form of government in which free speech is given an especially exalted jurisprudential status. That is to say, only in America. But while the importance we accord the first amendment may reflect a noble and commendable preoccupation with fundamental liberty, the more restrictive approach of other "free" countries is no less high-minded and could well prove the wiser course. It is not only a nation's social philosophy which determines the degree to which it will dictate or tolerate a system of laws, but its historical experience as well. Sweden, for example, specifically bans the wearing of an unauthorized military costume in public: "It is prohibited to carry uniforms or similar clothing that identify the political orientation of the person wearing the uniform."<sup>156</sup> Sweden also prohibits the defamation of a race:

If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for a group of a certain race, skin color, [or] national creed, he shall be sentenced for agitation against [an] ethnic group to imprisonment for at most two years or, if the crime is petty, to pay a fine.<sup>157</sup>

No doubt these laws, enacted after World War II, were in direct response to the horrors of the Holocaust. Taken together,

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156. This prohibition can also apply to parts of uniforms, arm bands, and other similar clearly visible means of identification. Violations are punishable by day fines (determined by one day's income). SFS 19947:164.

157. 16 SWED. PENAL CODE § 8 (1971), reprinted in 17 THE AMERICAN SERIES OF FOREIGN PENAL CODES (1972). In Canada, a Special Committee on Hate Propaganda reported:

While . . . over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man.

Not all democracies would base the prohibition of racial defamation on legalistic or moral grounds. For example, as an Australian law professor recently told the author in a private conversation, the Nazis would likely be prohibited from marching in the streets of Sydney "because it would be bad for tourism."

it seems clear that a march of Nazis through the streets of Stockholm would be preventable as a clear violation of the law, unprotected by any claims of "fundamental freedom." While such provisions would quickly be challenged in the United States and likely found wanting under the Constitution, in Sweden they remain accepted, untested, and innocuous.<sup>158</sup>

In Denmark as well, sharp limitations are placed upon speech that amounts to racial defamation. Section 140 of the Danish Criminal Code provides:

Any person who exposes to ridicule or insults the dogmas of worship of any lawfully existing religious community in this country shall be liable to simple detention, or in extenuating circumstances, to a fine.<sup>159</sup>

Section 266b further provides:

Any person who, by circulating false rumors or accusations persecutes or incites hatred against any group of the Danish population because of its creed, race, or nationality shall be liable to simple detention or, in aggravating circumstances, imprisonment for any term not exceeding one year.<sup>160</sup>

Likewise, group-libel in Great Britain is punishable under the Race Relations Act of 1965, Section 6(1) of which reads:

A person shall be guilty of an offense under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, ethnic or national origins—

- (a) he publishes or distributes written matter which is threatening, abusive or insulting: or
- (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being

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158. Author's taped interviews (in May of 1982) with Gunnar Karnell, Professor of Law at the Stockholm School of Economics; Per-Erik Nilsson, Chief Ombudsman of Sweden; Thorsten Cars, Swedish Press Ombudsman; and Gustaf Petren, a Justice of the Swedish Supreme Court. *But see* Oberg, *Is Sweden Ripe For Racism?*, 27 *SOCIAL CHANGE IN SWEDEN* 6 (Feb. 1983) (law and attitude-changing going together). Sweden's laws may be tested more frequently if what some perceive to be increasing anti-semitism continues.

159. DANISH CRIM. CODE § 140.

160. DANISH CRIM. CODE § 2666.

matter or words likely to stir up hating against that section on grounds of colour, race, or ethnic or national origins.<sup>161</sup>

In addition, the Consultative Assembly of the Council of Europe adopted model legislation in 1966 which reflects the position of other democratic nations:

#### Article 1

A person shall be guilty of any offence:

(a) if he publicly calls for or incites to hatred, intolerance, discrimination, or violence against persons or groups of persons distinguished by colour, race, ethnic or national origin, or religion:

(b) if he insults persons or groups of persons, holds them up to contempt or slanders them on account of their distinguishing particularities mentioned in paragraph (a).

#### Article 2

(a) A person shall be guilty of an offence if he publishes or distributes written matter which is aimed at achieving the effects referred to in Article 1 . . . .

. . . .

#### Article 4

Organizations whose aims or activities fall within the scope of Articles 1 and 2 shall be prosecuted and/or prohibited.

#### Article 5

(a) A person shall be guilty of an offence if he publicly uses insignia of organizations prohibited under Article 4.

(b) "Insignia" are, in particular, flags, badges, uniforms, slogans, and forms of salute.<sup>162</sup>

The precise way in which personal freedoms are or should be codified, therefore, depends upon one's orientation. That a

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161. As early as 1732, England recognized racial defamation as actionable. In *King v. Osborne*, 2 Barn. K.B. 166, the defendant was tried and convicted for accusing London's Portuguese Jews of racial murder.

162. EUR. CONSULT. ASS. DEB. 18TH SESS. (1966).

particular system of liberty is better than another is fuel for endless debate, and is as likely to have good arguments all around as it is unlikely to be resolved. For example, who is to say that the American Bill of Rights is a *better* system of liberty than the laws of other democracies, or that any of them are ethically or practically superior to the Ten Commandments?

It is also important to note that a large gulf can exist between the theory and practice of civil liberties. The Soviet Constitution, for example, is a model of guarantees for the natural rights of man; few observers, however, would characterize life in Russia as free by traditional democratic standards.<sup>163</sup> In contrast, Sweden, Denmark, and Great Britain deliver a good deal more than they promise.<sup>164</sup>

### III. CONCLUSION

The proper criteria by which any personal liberty must be measured, particularly the freedom of speech, are the degree to which it allows an individual to *impose* his speech on someone else and the *deleterious effect* of that speech. If either the imposition or the deleterious effect is excessive the liberty must be restricted. The effect of racial defamation is demonstrably deleterious, lacking any constitutional value. Its imposition is the verbal counterpart of a body blow to all persons swept within the scope of its contempt, as well as to the social fabric of American democracy. After all, the ultimate liberty is not freedom of speech, but the right to secure one's life.<sup>165</sup>

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163. See R. SHARLET, *THE NEW SOVIET CONSTITUTION OF 1977* 16-17 (1978) and LEVITSKY, *COPYRIGHT, DEFAMATION AND PRIVACY IN SOVIET CIVIL LAW* (1979).

164. See generally Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COL. L. REV. 727 (1942).

165. See W. BERNES, *FREEDOM, VIRTUE & THE FIRST AMENDMENT* 245 (1957). "This nation should not permit a powerful group of Hitlers or Stalins, even if they are silent, to develop—no matter how honestly or sincerely they hold to the Nazi or Communist ideology. To the extent to which they are bred among us, they represent a failure on the part of the law." *Id.* at 239. Bernes is hardly alone among legal scholars with this view. Professor Edwin S. Corwin wrote, more than a decade before the *Beauharnais* decision:

Freedom of speech and press has frequently more to fear from private oppressors than from other minions of government; conversely . . . there are utterances which cannot be tolerated on any scale without inviting social disintegration—incitations to race hatred, for example . . . .

"Liberty and Jurisdictional Restraint," quoted by Bernes at p. 149. And Professor David Reisman, in *Civil Liberties in a Period of Transition*, PUBLIC POLICY, Vol. III (1942),

We have long refused to corrupt the first amendment by saying that it protects obscene or dangerous speech. Utterances which cause damage to an individual's reputation are likewise left unprotected. But can one conceive of speech that is more damaging to a free and civilized society than racial hatred and contempt—whether it is a subtle disparagement of human dignity or an explicit plea for the destruction of a race?

That group-libel statutes are currently in the criminal codes of just five states<sup>166</sup> reflects ignorance of content-based exceptions to the free speech clause of the first amendment, the careful consideration of which would lead to the conclusion that group-libel need not be constitutionally protected.

*Beauharnais v. Illinois*, standing for the proposition that libelous utterances directed against groups are not protected speech,<sup>167</sup> has never been overruled.<sup>168</sup> Indeed, it continues to be cited with approval by federal and state courts.<sup>169</sup>

Other democracies have chosen to protect themselves and their people by banning such verbal assaults.<sup>170</sup> But in America the courts have ruled that Nazis must be permitted to march in public streets even though, as Justice Blackmun rightly observed, "every court has had to apologize for that result."<sup>171</sup> It is

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wrote:

A public policy for freedom of speech or any other single liberty of like importance should . . . have as its goal the maximization of its valid uses and the minimization of its invalid uses. How this is to be done, under the conditions of today, is a difficult, if not an intractable question of methods.

Quoted by Berns at p. 160.

166. See CONN. GEN. STAT. Sec. 53-37 (West 1960); ILL. ANN. STAT. ch. 38 Sec. 27-1 (Smith-Hurd 1977). (See Committee Comments - 1961, Revised in 1970 by Charles H. Bowman); MASS. ANN. LAWS. ch. 272, Sec. 98c (Michie/Law Co-op, 1980); MONT. CODE ANN. Sec. 45-8-212 (1984); NEV. REV. STAT. Sec. 2100-510 (1979).

167. *Beauharnais v. Illinois*, 343 U.S. 250.

168. See *Garrison v. Louisiana*, 379 U.S. 64, 82.

169. See, e.g., *New York v. Ferber*, 458 U.S. 747; *Central Hudson Gas & Electric v. Public Service Comm.*, 447 U.S. 592 (1980) (Rehnquist, J., dissenting); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 568 F. Supp. 602 (1983); *Rafferty v. Hartford Courant Co.*, 416 A.2d 1215 (Conn. 1980); *DePhilipppo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982); *Leech v. American Booksellers Ass. Inc.*, 582 S.W.2d 738 (Tenn. 1979).

170. See *supra* notes 152-57 and accompanying text.

171. *Smith v. Collin*, 436 U.S. 916, 918 (1978) (Blackmun, J., dissenting). For similar arguments that group-libel laws are (or should be) constitutional, see Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308, 332 (1979), and Note, *Group Defamation and Individual Actions*, 71 CAL. L. REV. 1532, 1556 (1982).

The Anti-Defamation League of B'nai B'rith is not opposed in principle to the pun-



time for courts to stop apologizing and to begin properly analyzing the nature of racial defamation. The legitimate interests of its victims, who in the long run include all of us, should not be sublimated to a blind and, in this situation, misplaced principle.

To believe that all ugly ideas will wither when aired would be the height of naivete. It would cast contempt upon history. It would ignore the most frightening paradox of our time: that the utterly despicable Nazi philosophy was born, after all, as a legitimate expression of political thought, and flourished amid the utterly civilized German culture, and was embraced by the utterly sophisticated German people. Repressing private thoughts of racial superiority may be impossible, but refusing the free expression of the idea may be necessary to the survival of democratic principles.

Punishment of racial defamation has not jeopardized liberty elsewhere, nor would democracy in America suffer were bigots prohibited from mongering hatred on the public streets. Events of the Twentieth Century should have taught us, once and for all, that the pith of racial extremism rests in the racists' fervently held beliefs, in their political thought, in their ideas, in their "truth"—none of which the freedom of speech was designed to protect, and none of which should be allowed to pervert the nobility of the first amendment.

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ishment of those originating or disseminating group libel. It takes cognizance of the possibility of such libel presenting a clear and present danger to public order. It is not convinced that any of the broad, general group-libel proposals heretofore considered in various law-making bodies in the United States are satisfactory or constitutional. Yet the possibility of enacting such legislation should not be despaired of and we should continue to look to such legislation as an eventual possibility. The Anti-Defamation League of B'nai B'rith approves in principle legislation extending the present proposal provisions to make nonmailable, cards or envelopes which bear on their face libels of racial or religious groups.